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## Lawyer as Emotional Laborer

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Sofia Yakren\*

*Prevailing norms of legal practice teach lawyers to detach their independent moral judgments from their professional performance—to advocate zealously for their clients while remaining morally unaccountable agents of those clients' causes. Although these norms have been subjected to prominent critiques by legal ethicists, this Article analyzes them instead through the lens of "emotional labor," a sociological theory positing that workers required to induce or suppress feeling in order to sustain the outward countenance mandated by organizational rules face substantial psychological risks. By subordinating their personal feelings and values to displays of zealous advocacy on behalf of others, lawyers, too, may face acute psychological distress and professional dissatisfaction; ironically, legal practice norms may place the heaviest psychological burden on those lawyers most oriented toward justice. This Article explores several potential antidotes to the deleterious effects of emotional labor on legal practitioners, including: (1) deep acting, or the process by which a person attempts to experience the emotions that she is expected to display (effectively, the antithesis of detachment); (2) self-selection into (or out of) the legal profession based on certain personality traits, or self-selection into certain work environments based on one's personal values; and (3) a shift in the standard conception of the lawyer's role toward greater moral autonomy for lawyers. Empirical researchers are called upon to generate data suggesting how best to alleviate lawyers' emotional labor without entirely eliminating the potential usefulness of emotional labor as a check on unethical conduct in legal practice.*

## I. INTRODUCTION: LAWYERS FEEL TOO

No social role encourages such ambitious moral aspirations as the lawyer's, and no social role so consistently disappoints the aspirations it encourages.<sup>1</sup>

—William H. Simon

We are taught to be true to ourselves—to our beliefs, our values, our hearts. Some of us enter law school to live out this maxim through the representation of others. But we find that our chosen profession often demands the opposite of us—that we compromise

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1. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 1 (1998).

our personal attitudes and feelings when they are incongruent with the interests of our clients, even if their interests seem unjust. This expectation enables clients to exercise their autonomy through the legal process,<sup>2</sup> but it may also come at a great psychological cost to lawyers.

As traditionally conceived, a lawyer's fundamental role is to advocate zealously on behalf of her clients, while in fact remaining professionally detached. She is to consider herself morally unaccountable for the means used or the ends achieved in advocacy, because a sense of responsibility might undercut her ability to perform zealously. In promoting such norms, the legal profession seeks to halt lawyers' inner conflicts, perceiving them as potentially damaging to client interests.<sup>3</sup> Protecting client interests from lawyers' personal preferences may be an admirable aspiration in itself, but one that begs a previously unasked question about trade-offs: what happens to lawyers when they—over and over again—subordinate their feelings and values to requisite displays of zealous advocacy on behalf of others?

It is no surprise that the legal profession expects lawyers to perform on unemotional terms, without questioning their ability to do so, or the attending costs. Under what is arguably the prevailing view in American law, emotion is "a corruptive force that . . . must be carefully cabined so that it does not bias or influence logic and rational reasoning."<sup>4</sup> Legal scholars have, however, slowly begun to recognize the relevance of human psychology to a fuller understanding of legal systems and actors and, thereby, to envision a more integral role for emotion in the law. For instance, these scholars have challenged the focus on rationality and reason in the law by exploring the role of emotions in judgments and decisions, not as a corruptive force, but "as an equally valid and important aspect of legal decisionmaking . . . ."<sup>5</sup> These inquiries have addressed such issues as: the deficiency of cognition-based legal rules, juries' use of the "right emotions" in decisionmaking, and humans' ability to think rationally during emotional states.<sup>6</sup>

In recognizing that emotion is an inevitable aspect of the law, some commentators have even shifted the spotlight to lawyers in particular. One author applies Freudian theory to emphasize the

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2. See, e.g., Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

3. See *infra* Part II.

4. Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 160 (2005).

5. *Id.* at 160–61.

6. *Id.* at 161.

need for lawyers to recognize and resolve strong emotional reactions towards their clients—so that they may enhance these relationships, and avoid adversely influencing their representations.<sup>7</sup> She urges, “lawyers must acknowledge that emotional responses are triggered in virtually every human encounter . . . . [A]cceptance that they *might* be problematic is an essential first step in recognizing the situations in which they may impair the representation . . . .”<sup>8</sup> With a similar emphasis on professional efficacy, another author conducts a critical analysis of existing scientific research regarding the effect of mood on negotiation, and offers practical advice to lawyers on how they might improve their moods for better negotiation results.<sup>9</sup> He counsels against simply ignoring or suppressing emotion because “the very thoughts one tries to suppress will often come back more frequently and/or more intensely,” impairing one’s cognitive skills, diminishing physical and mental health outcomes in the long-run, and possibly leading to worse negotiation outcomes.<sup>10</sup>

Legal scholars have even begun to move away from viewing lawyers as mere instruments, treating their mental health as an endpoint worth exploring, in and of itself, rather than as a predictor of occupational efficacy. For example, they have studied the relationship between personality and job satisfaction among lawyers, suggesting methods of practice best suited to lawyers with certain personality traits atypical of lawyers generally (e.g., those tending to make decisions through feeling, rather than thinking).<sup>11</sup> Other authors have explored the “moral anxiety” afflicting lawyers, without directly applying theories of psychology. For instance, one scholar asks whether lawyers who represent abusive parents can find psychic relief in a variety of moral justifications, including one positing that lawyers behave morally even when they set aside their own values to advance those of their clients because they do so in the name of client autonomy.<sup>12</sup>

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7. See Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259, 260–74 (1999).

8. *Id.* at 276.

9. See Clark Freshman et al., *The Lawyer-Negotiator As Mood Scientist: What We Know and Don’t Know About How Mood Relates to Successful Negotiation*, 2002 J. DISP. RESOL. 1, 4.

10. *Id.* at 67.

11. See, e.g., Lawrence R. Richard, *Psychological Type and Job Satisfaction Among Practicing Lawyers in the United States*, 29 CAP. U. L. REV. 979 (2002); Susan Daicoff, *Making Law Therapeutic for Lawyers: Therapeutic Jurisprudence, Preventive Law, and the Psychology of Lawyers*, 5 PSYCHOL. PUB. POL’Y & L. 811 (1999).

12. See Marie Ashe, “*Bad Mothers*,” “*Good Lawyers*,” and “*Legal Ethics*,” 81 GEO. L.J. 2533, 2539 (1993).

Lawyers provide fertile ground for the application of socio-psychological<sup>13</sup> theories because, as the profession breeds formalistic reasoning and repression of emotions, “[t]hat disconnect between being a human being and a technician causes pain and drives people out of the profession.”<sup>14</sup> Accordingly, despite cartoons depicting lawyers as unfeeling technocrats,<sup>15</sup> there is evidence that lawyers experience psychological angst—at rates significantly greater than average.<sup>16</sup> A 1995 study found that depression, anxiety, social isolation and alienation, hostility, paranoid ideation, and obsessive-compulsive symptoms are more prevalent among attorneys than in the general population.<sup>17</sup> Additionally, studies show that lawyers are anywhere from three to thirty times as likely as the general population to suffer from substance abuse problems, including alcoholism.<sup>18</sup> Legal education and practice have something to do with these poor mental health outcomes: a 1986 study revealed that, while only about ten percent of entering law students exhibited significant symptoms of psychological distress, thirty-two percent did so by the end of their first year of law school, and forty percent by the end of their third year.<sup>19</sup> Although this percentage decreased to 17.9 two years after graduation,<sup>20</sup> it appears that lawyers do not return to their pre-law school level of psychological health. In addition, in the period

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13. This Article invokes the language of psychology in reference to lawyer angst. However, assuming that, at the most basic level, psychology is the science of the individual and sociology the science of society, this Article in fact lies at the intersection of the two fields by examining the psychological impact of legal culture on individual lawyers. Citing to psychologists and sociologists alike, the Article analyzes legal practice through a socio-psychological lens.

14. Elaine McArdle, *From Ballistic to Holistic*, THE BOSTON GLOBE, Jan. 11, 2004, Magazine, at 14, available at [http://www.boston.com/news/globe/magazine/articles/2004/01/11/from\\_ballistic\\_to\\_holistic/](http://www.boston.com/news/globe/magazine/articles/2004/01/11/from_ballistic_to_holistic/).

15. See, e.g., THE NEW YORKER, THE NEW YORKER BOOK OF LAWYER CARTOONS 1 (Alfred A. Knopf ed., 1993) (“I consider myself a passionate man, but, of course, a lawyer first.”).

16. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 874–88 (1999).

17. Connie J. A. Beck et al., *Lawyer Distress: Alcohol-Related Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1, 49–50 (1995–96).

18. See Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 555 (1998) (citing Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is it Time For a New Approach?*, 61 TEMP. L. REV. 1409 (1988); Andrew V. Hansen, *Alcoholism in the Lawyer's Context*, 7 LEGAL REF. SERV. Q. 231, 236 (1987)).

19. See Daicoff, *supra* note 18, at 556 (citing G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Attorneys*, 13 INT. J. LAW & PSYCHIATRY 233, 234 (1990)).

20. See Daicoff, *supra* note 18, at 556.

since a 1984 study by the American Bar Association (ABA), practicing lawyers have reported rising levels of job dissatisfaction.<sup>21</sup> By 1990, dissatisfaction had doubled for lawyers in private practice, and levels of satisfaction had plummeted for the most satisfied lawyers, as well.<sup>22</sup> According to a 2005 NALP Foundation study, the majority of surveyed attorneys reported that they “felt stressed and fatigued most of the time.”<sup>23</sup>

Countless factors might contribute to lawyers’ psychological struggles. But, surprisingly, legal scholars have omitted an essential contender by failing to explore—from an emotional labor perspective—what unique features of the legal profession may be accountable for lawyers’ mental health problems. This Article focuses on the fundamental, yet previously unelaborated, issues of how and why certain legal practice norms—particularly, zealous advocacy and moral non-accountability—may cause lawyers psychological distress. In doing so, this Article implicitly embraces “therapeutic jurisprudence,” a conceptual framework designed to study “the extent to which substantive rules, legal procedures, and the roles of lawyers and judges produce therapeutic or antitherapeutic consequences.”<sup>24</sup>

Accordingly, in Part II, I set out the standards of professional conduct traditionally imposed on lawyers. In Part III, I describe the sociological theory of emotional labor, which posits that organizationally-defined behavior norms require workers to manipulate their emotions in ways that cause psychological distress. I then apply the theory specifically to lawyers, asking: how are lawyers impacted when they feel negative, or even just ambiguous, about a particular client, case or legal strategy because their action may lead to injustice, yet professional role requirements instruct them to detach from these feelings and undertake zealous representation anyway? I conclude that emotional labor theory teaches what the legal profession has neglected to perceive—that a lawyer in such a position must strain to exhibit the requisite outward expressions despite her personal feelings, and, in some cases, will suffer long-term psychological damage as a result. Finally, in Part IV, I explore ways to reduce the negative effects of lawyers’ emotional labor, including deep acting to align felt emotions with expected

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21. See Richard, *supra* note 11, at 984 (citing AM. BAR ASS’N, THE STATE OF THE LEGAL PROFESSION 1990 (1991)).

22. See Richard, *supra* note 11, at 984.

23. SUSAN SAAB FORTNEY, IN PURSUIT OF ATTORNEY WORK-LIFE BALANCE: BEST PRACTICES IN MANAGEMENT 97 (Paula Patton ed., 2005).

24. David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIAMI L. REV. 979, 981 (1991).

ones, self-selection into the legal profession and particular work environments, and the expansion of moral autonomy in legal practice.

Emotional labor is relevant to a discussion of lawyering because it is endemic to it, despite traditional efforts to exile emotion from legal thought. The vast majority of lawyers likely expend such effort on a regular basis, even as they are urged to detach by a legal profession that remains seemingly oblivious to their struggles, and as social scientists fail to provide the necessary empirical research to spur intelligent change. Furthermore, if empirically proven, the disconnect between lawyers' personal values and their professional role requirements may be a sign, not only of mental health risks, but also of the need to make legal practice a more ethically sound experience. Because of lawyers' unique function in society, their emotional labor has implications distinct from that of other workers who have been central in the psychology literature to this point. Although there are a variety of ways to address the ramifications of emotional labor, this Article theorizes that the best solution in the name of both lawyer wellness and professional ethics is to reconsider the standard conception of the lawyer's role. As it stands right now, the legal profession may be undermining itself by driving out those lawyers most oriented toward justice.

## II. ZEALOUS ADVOCACY AND NON-ACCOUNTABILITY IN THE LEGAL PROFESSION: ESTABLISHING THE CONFLICT BETWEEN PERSON AND PROFESSIONAL

### *A. Standard Conception of the Lawyer's Role*

David Luban describes the "standard conception" of the lawyer's role as embodying two principles according to the profession's official codes and unofficial mores: 1) partisanship, such that "[a] lawyer must, within the established constraints on professional behavior, maximize the likelihood that the client's objectives will be attained," and 2) non-accountability, such that "[i]n representing a client, a lawyer is neither legally, professionally, nor morally accountable for the means used or the ends achieved."<sup>25</sup>

Since their inception, ABA standards of professional conduct for lawyers have promoted the partisanship value.<sup>26</sup> Through the

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25. David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1004 (1990).

26. The first national standards for lawyers were the Canons of Professional Ethics, adopted by the ABA in 1908. In 1969, the ABA replaced the Canons with the Model Code of

roughly interchangeable language of zealous advocacy borrowed from Canon 15 of the 1908 Canons of Professional Ethics, Canon 7 of the Model Code of Professional Responsibility (Model Code) reflects the principle of partisanship: "A lawyer should represent a client zealously within the bounds of the law."<sup>27</sup> Comment 1 to Rule 1.3 of the Model Rules of Professional Conduct (Model Rules), which governs lawyers today, similarly states:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with *zeal in advocacy upon the client's behalf*.<sup>28</sup>

Luban warns that confining zealous advocacy within the bounds of the law does not preclude problems of morality, for "[t]he limits of the law inevitably lie beyond moral limits, and zealous advocacy always means zeal at the margin."<sup>29</sup>

William Simon, thus, describes the "prevailing approach to lawyers' ethics"—what he calls the "Dominant View"—as follows: "the lawyer must—or at least may—pursue any goal of the client through any arguably legal course of action and assert any non-frivolous legal claim."<sup>30</sup> The Dominant View, reflected in the bar's disciplinary codes, the case law on lawyer discipline, and the commentary on professional responsibility, makes loyalty to the client the only ethical duty distinctive to the lawyer's role,<sup>31</sup> imposing "no responsibility to third parties or the public different from that of the minimal compliance with law that is required of everyone."<sup>32</sup> Simon poignantly diagnoses the problem attending such unqualified zeal: "If I am right, the key source of moral anxiety [among lawyers] is the perceived tenuousness of the connection between the concrete immediate injustices of practice and the remote justice that is supposed to redeem them."<sup>33</sup> The purpose of this Article

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Professional Responsibility, and, in 1983, it adopted the Model Rules of Professional Conduct to replace the Code. See MODEL RULES OF PROF'L CONDUCT Preface (2004).

27. MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980); see also DAVID LUBAN, LAWYERS AND JUSTICE 11 (1988).

28. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2008) (emphasis added).

29. David Luban, *The Adversary System Excuse*, in THE GOOD LAWYER 83, 89 (David Luban ed., 1983).

30. SIMON, *supra* note 1, at 7.

31. See *id.* at 7–8.

32. *Id.* at 8.

33. *Id.* at 3.



is to explain the emotional processes underlying lawyers' moral anxieties, so that we may pursue psychologically sound solutions.

Despite common perception to the contrary, the principle of partisanship (arguably, often in tension with morality) does not apply only to litigators. While many transactional business lawyers deny this, "the principle of partisanship is generally taken as a credo by lawyers in nonadvocate roles just as much as by courtroom lawyers."<sup>34</sup> Thus, the legal profession instructs lawyers, in whatever setting, to place client directions—even morally questionable ones—above their own beliefs.<sup>35</sup>

Such a broadly applicable, client-oriented tenet of professional conduct can be disconcerting in that "it sets aside the question of whether the client *should* prevail," turning the lawyer into a mere instrument of her client's interests, regardless of whether these interests seem just.<sup>36</sup> Dramatic outlying examples aside, Luban notes that "all litigators have had cases where, in their heart of hearts, they wanted their client to lose or wished that a distasteful action did not need to be performed," but they had to ignore the externalities of their advocacy in order to serve their clients.<sup>37</sup> Partisanship begins to look even more like corrupt instrumentalism as Luban paints a picture in which "the lawyer's art is to manipulate arguments about law and fact (within the established constraints . . .)—to bend, fold, and spindle, if not mutilate, the facts and the law. . . . [and thereby] [t]he lawyer either cheats her way to justice or cheats justice."<sup>38</sup> This intentional caricature illustrates the source of our "nagging disquiet" over the principle of partisanship: through "instrumental morality," the legal profession undermines the authority of the law.<sup>39</sup>

Ironically, the legal profession manages to uphold a principle of conduct that enables lawyers to assert morally unsupportable legal interests by seeking a greater social good—justice. The underlying assumption is that the adversary system, supposedly the best way of attaining justice, will not work properly unless each lawyer presents her side, just or unjust, as zealously as possible.<sup>40</sup> By the same to-

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34. LUBAN, *supra* note 27, at 11.

35. *See id.* at 12.

36. *Id.* at 12–13.

37. Luban, *supra* note 29, at 87.

38. LUBAN, *supra* note 27, at 13, 15.

39. *Id.* at 15–16.

40. *See* Luban, *supra* note 29, at 89; *see also* Ashe, *supra* note 12, 2546–47 (recognizing traditional justifications "in support of the role adopted by the lawyer representing a parent charged with child abuse . . . [include] the lawyer's playing an essential role in a somewhat imperfect but basically good 'system,'" or, more likely, "the defense lawyer's fairly firm con-

ken, the adversary system serves as a justification for the non-accountability prong of the standard conception of the lawyer's role because lawyers who are held accountable for their actions "will be morally obliged to restrain their zeal whenever they find that the 'means used or the ends achieved' in the advocacy are morally wrong," in violation of the partisanship ideal.<sup>41</sup>

Although, technically, rationales based on the adversarial model hold within the context of adjudication only, if at all, lawyers "commonly act as though . . . [the] two principles characterized their relationship with clients even when the representations do not involve the courtroom."<sup>42</sup> Furthermore, Luban urges, "[e]ven lawyers with nothing good to say about the legal system in general believe that their current actions are justified or excused by the nature of the adversary system."<sup>43</sup> He considers the "universal acceptance among lawyers of the Justification of the Adversary System [] a startling thing, a marvelous thing, a thing to behold," and criticizes lawyers for failing to question the justification, particularly since their moral redemption hinges on the effectiveness of the adversary system—the degree to which it can truly deliver on that greater good we call justice—which remains an open empirical question.<sup>44</sup>

Interestingly, though Luban does not believe that lawyers *should* fully separate their personal and professional identities ("when professional and moral obligation conflict, moral obligation takes precedence"),<sup>45</sup> he suggests that they nonetheless are *able* to do so with ease, by simply embracing the non-accountability principle. And he makes this conclusion despite recognizing that all lawyers have clients whom, in their "heart of hearts,"<sup>46</sup> they would rather not represent.

Along these lines, the American Law Institute (ALI), in allowing lawyers the autonomy to express their political views, assumes that they *can* and *should* professionally detach, so as to cabin their personal political views from their client representations:

In general, a lawyer may publicly take personal positions on controversial issues without regard to whether the positions

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viction that she does something positively good by resisting the operation of a 'system' that is itself perverse or skewed in its unjust operation against the accused.").

41. Luban, *supra* note 29, at 90.

42. *Id.*

43. *Id.* at 89.

44. *Id.*

45. *Id.* at 118.

46. *Id.* at 87.

are consistent with those of some or all of the lawyer's clients. Consent of the lawyer's clients is not required. Lawyers usually represent many clients, and *professional detachment* is one of the qualities a lawyer brings to each client. Moreover, it is a tradition that a lawyer's advocacy for a client should not be construed as an expression of the lawyer's personal views.<sup>47</sup>

Similarly, the ABA Model Rules implicitly presume that lawyers can seamlessly separate conflicting personal views and professional actions: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."<sup>48</sup> The ABA Model Code, though no longer in effect, reveals the timeless saliency of this presumption in professional standards for lawyers:

The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client. While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of a client in a matter he is then handling, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client.<sup>49</sup>

At first glance, detachment appears a fair trade-off for the lawyer's right to maintain personal political views—but does human psychology work so simply? If Luban and Simon are right, the standard conception of the lawyer's role is to serve her client exclusively by going to the oft-immoral limits of the law, all the while blocking out negative third-party externalities. Intuition counsels that many human beings operating in such a capacity will experience discomfort as their actions conflict with their own sense of morality. Nonetheless, when the legal profession nonchalantly counsels lawyers to invoke detachment in order to advocate zealously regardless of how they feel about a case or a client, it assumes implicitly either that lawyers are able to comply without negative consequence, or that it is their professional obligation to pay a psychological price. Either way, the legal profession fails to

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47. 2 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 125e (2000) (emphasis added).

48. MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2008).

49. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-17 (1980).

acknowledge explicitly the emotional hardships potentially attending the process of compromising one's personal identity for professional role.

These emotional hardships may be conceptualized in two ways: 1) in terms of the risks of achieving severance of personal and professional identity, if a lawyer is willing and/or able to cope with inner conflict by detaching, and 2) in terms of the costs of existing in a state of conflict between personal and professional self, if a lawyer is unwilling and/or unable to detach. In theory, complete detachment and full-fledged inner conflict represent two endpoints on the same spectrum as a lawyer struggles to cope with divergent personal values and professional expectations.

The following section explains that the first conceptualization—the impact of detachment on the mental health of lawyers—has already been addressed in the literature. The remainder of the Article then focuses on the second conceptualization, arguing that a lawyer experiencing tension between the partisanship principle and her personal preferences, values, or morals, despite the detachment mandate, performs emotional labor and may therefore suffer psychological strain. Undue focus on detachment as a solution to the lawyer's personal-professional conflict deflects attention away from this potentially elucidating perspective.

Before proceeding further, one disclaimer is in order. Some scholars may wonder whether professional norms fully embody the standard conception of the lawyer's role, or question whether the standard conception is truly pervasive in the world of legal practice. As for the former issue, even Luban concedes that the Model Code and Model Rules are more complex than his standard conception suggests in that they seek to “mitigate the more repugnant implications of partisanship and non-accountability.”<sup>50</sup> He ultimately concludes, however, that these attempts at mitigation still leave lawyers only one option if a client adamantly insists on a morally repugnant course of action—resignation.<sup>51</sup> Since the frequency with which questions of morality arise in legal practice would seem to exceed significantly the frequency of resignations, the standard conception remains relevant.

Meanwhile, the latter question is an empirical one that currently has no clear answer, but one that Luban addresses at least anecdotally to suggest that lawyers overwhelmingly embrace the standard conception.<sup>52</sup> Of course, with more recent trends in the law, such as

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50. LUBAN, *supra* note 27, at 394.

51. *See id.* at 395.

52. *See supra* text accompanying notes 34–35, 42–44.

alternative dispute resolution, the issue warrants revisiting. Nonetheless, one need not imagine the most pervasive and extreme version of partisanship to recognize that conflicts between client interests and lawyer values occur frequently enough in daily practice to make lawyering emotionally daunting. In addition, even if lawyers are not fully embracing the partisanship ideal, they may be struggling as a result of its demands on their identity, as explored in Part IV.A.1. In short, this Article amplifies the potential conflict between zealous advocacy and personal morality in order to draw attention to a plausible—and not unlikely—source of lawyer angst. The precise extent to which this is a real world problem must be explored empirically, and is a question for another day.

### *B. Detachment and the Lawyer's Conflict*

Literature analyzing the legal profession's answer to lawyers' personal-professional conflicts perceives a deeper, potentially more disabling, psychological danger than the legal profession likes to admit. For instance, Gerald J. Postema argues that, by requiring certain personal qualities, the professional role defines an identity or self-image for its occupant not readily severable from the rest of her identity. It is necessary to explore the relationship between the professional self and the character of the person occupying the role because:

Traits of character are traits of whole persons—that is, of agents who in their actions express and realize a conception of self, and who therefore both are expected and fervently seek to integrate these traits into a coherent and feasible conception of self. Because of this, the question of what set of dispositions is desirable in an incumbent [sic] in the [professional] role cannot be separated from the intensely personal question of whether a relatively good person can fill the role and live an integrated life without shame.<sup>53</sup>

Unlike Luban, the ALI, or the ABA, Postema explicitly acknowledges that people cannot detach their professional identities from their personal ones without great personal cost. In considering “how lawyers may come to terms with the apparent threat posed by their professional role to their moral integrity,” he concludes that

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53. Gerald J. Postema, *Self-Image, Integrity, and Professional Responsibility*, in *THE GOOD LAWYER*, *supra* note 29, at 286, 287–88.

the conception of professional role embodying “principles of partisanship and neutrality” is “deeply defective” because it actively encourages lawyers to adopt “detachment strategies at the expense of the development and exercise of mature, responsible moral judgment . . . .”<sup>54</sup>

Just as the “standard conception” of the lawyer’s role instructs, lawyers employing “detachment strategies seek to detach the *self* from the role [and] to *define the self* in such a way that the morally problematic aspects of the role do not reflect on it.”<sup>55</sup> One method of detachment entails dissociating the private personality from the professional one, and treating them as entirely separate selves (“schizophrenic strategy”).<sup>56</sup> The other method involves regarding professional experiences as having no relationship with the self at all (“restricted identification strategy”). This is best explained by the quote, “an *honest* man is *not responsible* for the vices of his calling.”<sup>57</sup> Either way, the private identity takes no responsibility for the moral wrongs of the professional activity.<sup>58</sup>

Even though “an active conscience can be costly,”<sup>59</sup> Postema argues that the alternative—“schizophrenic strategy”—comes at too great a personal cost to lawyers, not because everyone experiences disunity as psychological discomfort (in fact, extreme detachment is marked by the absence of anxiety or conflict), but because it results in no self at all:

A necessary condition of a healthy self-concept, of a whole and harmonious self, is the awareness that the elements of practical experience are internally related, in the sense that they bear on each other, that they can conflict or complement, threaten or reciprocally support each other, and that the individual, the self, has a definite stake in the outcome. Self-consciousness, then, is a necessary condition of the self.<sup>60</sup>

This absence of self-consciousness is possible to achieve. It accounts for Eichmann’s role in the Nazi regime (a most extreme example, of course) and the ease with which he adopted divergent, even monstrous, practices.<sup>61</sup> And, in achieving it, an individual

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54. *Id.* at 288–89.

55. *Id.* at 291–92.

56. *See id.* at 292.

57. *See id.* (attributing quote to Renaissance author Michel de Montaigne).

58. *See id.* at 292–93.

59. *Id.* at 293.

60. *Id.* at 297.

61. *See id.* at 294–95, 297.

faces personal costs, including radical self-deception, incoherence, and alienation from the interpersonal world.<sup>62</sup>

The "restricted identification strategy" is less extreme than the "schizophrenic strategy" in that it allows for unity of self by relegating conflicting experiences entirely outside of the self, rather than to a separate professional self—as if the person does not identify with those experiences at all. However, Postema urges that "it is a grave mistake to regard determination of the self's boundaries as strictly a subjective matter . . . ."<sup>63</sup> Since a person chooses to become a lawyer, it is impossible for her simply to avoid identifying with her activities in the role.<sup>64</sup> In addition, lawyers constantly have the opportunity to exercise power, which is a source of personal self-expression and pleasure.<sup>65</sup> One cannot feel emotions about such activities without seeing them as a reflection on oneself; "even the most detached lawyer will feel pride, or a sense of fulfillment or frustration, regarding his or her performance of regular responsibilities of the role."<sup>66</sup> Furthermore, the fact that any morally problematic ends can be ascribed to the client's direct intent does not remove responsibility from the lawyer because:

The agent is not simply his or her intentions; the self is not simply the product of actions issuing from intentions . . . . [E]ach is tied with manifold knots to the world and other selves. To seek to disentangle the self from these ties . . . is impossible; to claim that one has effectively done so is either bad faith or self-deception.<sup>67</sup>

The professional detachment mandate treats lawyers like mere agents, when in fact they may often, and inevitably, feel more like culpable principals.

However hyperbolic and theoretical Postema's analysis may seem, he sheds light on the fact that the standard conception of the lawyer's role places difficult, and often unattainable, psychological demands on lawyers—urging them to brush off accountability by detaching from their professional selves, so that they may be fully partisan on behalf of their clients, rather than helping them deal effectively with the complexities of professional life. In passing, Postema poses inner conflict ("disintegrated con-

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62. *Id.* at 298–99.

63. *Id.* at 299.

64. *See id.* at 300.

65. *See id.* at 301.

66. *Id.* at 301.

67. *Id.* at 304.

sciousness”) between personal morality and professional duty as an alternative better than detachment because at least it aspires, in all its self-consciousness, to unity of the soul.<sup>68</sup> The subject of this Article is this very inner struggle in the face of partisanship demands. The personal-professional conflict seems more likely than complete detachment to afflict lawyers broadly, given the psychological incapacitation of “schizophrenic strategy” and the impracticability of successfully implementing “restrictive identity strategy.” At the very least, it affects enough lawyers—at one poignant moment or another—to matter. Inner conflict comes with its own share of psychological costs to lawyers, and it is potentially exacerbated by the drive toward detachment. In a legal culture that pits professional against personal, we must weigh the debilitating effects of detachment as a coping mechanism against the costs of living in conflict and other possible alternatives.<sup>69</sup>

### III. THE LAWYER’S INNER CONFLICT: AN EMOTIONAL LABOR PERSPECTIVE

I try to define why I return, as I always do, to representing ‘bad mothers’—although sometimes those ‘cases’ exhaust me, wear me down, make me depressed, make me angry, leave me spiritually depleted, and therefore make me ask: Why am I doing this?<sup>70</sup>

—Marie Ashe

There is something odd when a lapsed lawyer writes about the practice of law, but I’ve got something to get off my chest. I didn’t like some of the things I did as a lawyer. I took positions I didn’t believe in. I made arguments that I thought bordered on untrue. I postured. I bluffed. I pursued advantages provided more by clients’ resources than the value of their claims. And, I found out that doing the things that lawyers

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68. See *id.* at 295–96.

69. Less extreme forms of detachment may be a relatively healthy alternative for lawyers, and this point is explored furthered in Part IV.A. However, Postema’s extreme theoretical construct provides a good context for thinking about professional-personal conflict.

70. Ashe, *supra* note 12, at 2565.



do—ethical things!—can be painful. The problem is, I didn't learn this lesson until I became a lawyer.<sup>71</sup>

—Richard Matasar

Though their prevalence is nearly impossible to quantify, many lawyers appear to exist in painful conflict with their professional selves.<sup>72</sup> Ashe and Matasar are examples, continuing to own their internal angst because they are unable or unwilling to adhere to the profession's detachment recommendation. At times, I have stood among them, frankly, in greater fear of detachment than the alternative, for as long as I struggle, I continue to possess myself. During the summer after my second year of law school, I struggled to make sense of the mandate of zealous advocacy in the face of a gut that refused to comply. I knew that my client, a woman suffering from serious mental illness, deserved representation against the psychiatric center that sought to commit her. But did I naturally feel zealous on her behalf? No. Her situation was so awfully textured and ambiguous that no one could know whether she should stay or go—at least not without reservation. So I felt doubt about her best interests and about her understanding of her own best interests. To pretend that I knew the right path with zeal caused me pain—no rule of professional detachment or non-accountability was going to spare me that. I felt like I was defying truth, rather than seeking it, and leaving the final answer to the judge, or to the system, left me no less implicated in my heart. In the end, I stood up in court and argued her case with the requisite zeal—and even felt good about it—but to pretend that the process was not emotionally daunting would be to cheat lawyers of an explanation (albeit partial) for their troubles.

Lawyers' inner conflicts can take different forms. A lawyer like Ashe, representing abusive mothers, may consider her clients morally repugnant, feel concern about the best interests of their children, and thereby fear facilitating her clients' abusive patterns through advocacy. A discomfort akin to Matasar's takes on the somewhat different focus of questionable advocacy tactics—bluffing, posturing, telling half-truths—though deemed ethical, or at least not unethical, by the profession—feel wrong to him. My scenario falls somewhere in-between—while I did not consider my client morally repugnant, I was concerned about the potential ex-

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71. Richard A. Matasar, *The Pain of Moral Lawyering*, 75 IOWA L. REV. 975, 975 (1990).

72. This is not to say that lawyers never feel pride and consonance about their work, but the upside of legal practice is not the subject of this Article.

ternalities that my role did not allow me to address. All three of us have in common a strong sense of accountability for furthering some sort of potentially bad end—be it endangering a child, releasing a patient to greater harm in the community, or engaging in a system that promotes morally suspect advocacy tactics. And the legal profession currently provides no satisfying response to such lawyer concerns.

Assuming that professional norms condone amoral conduct in certain scenarios, we may be concerned as a society that lawyer discomfort in the face of role expectations warns of potential affronts to commonly understood notions of morality.<sup>73</sup> This Article focuses on the emotional labor attending such inner conflict, even though additional conceptualizations of how lawyers perform emotional labor are possible,<sup>74</sup> because it is endemic to the very principles of the legal profession and has potential societal ramifications in its capacity to sound warning bells about unethical professional conduct.

In employing the emotional labor framework, which is described in the next section, this Article begins to provide the answers that

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73. A lawyer conceivably could experience inner conflict for relatively idiosyncratic reasons. Though conflict of any sort, regardless of its origin, could result in psychological harm, this Article is particularly concerned with the type of conflict that signals moral compromise because of its implications for the legitimacy of the legal profession.

74. Arlie Russell Hochschild addresses the emotional labor of lawyers in only one paragraph of her book. See ARLIE R. HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 151–52 (Univ. of Cal. Press 2003) (1983). In this brief discussion, she acknowledges that lawyers must work to produce an emotional state in their clients. See *id.* For instance, “[d]ivorce lawyers . . . must try to induce calmness in angry and despairing clients, who may want to escalate instead of conclude a battle over money, property, and children.” *Id.* at 151. This example reflects how lawyers may have to employ emotional labor in seeking to shape their clients’ goals—an attempt which, if successful, could possibly resolve a conflict between what the lawyer feels is right and what the client wants to achieve. However, the illustration fails to convey the specific labor involved when a lawyer must betray her own feelings to advocate zealously for a client who, say, refuses to adjust her goals, or who a lawyer does not even seek to influence out of respect for the client’s autonomy.

As a second example, Hochschild describes lawyers who specialize in wills, and are swept into family disputes and forced to take stances that seem unfair (in their effect on other members of the family) on behalf of their clients. See *id.* at 151–52. Interestingly, again she highlights the fact that the trusts and estates lawyer “risks becoming the butt of someone’s anger, while at the same time he must maintain the trust of everyone involved,” rather than on the work involved in posing as a zealous advocate for an arrangement he believes to be unfair. *Id.* at 152.

Thus, while Hochschild recognizes that “[p]sychiatrists, social workers, and ministers, for example, are expected to feel concern, to empathize, and yet to avoid ‘too much’ liking or disliking,” she does not provide a comparable portrait of the emotion work behind the expectation that lawyers argue their cases with zeal and simultaneous professional detachment. *Id.* at 150. The emotion work involved in carrying out zealous advocacy in the face of inner conflict is the focus of this Article—emphasizing that emotion work is endemic to the very principles of the legal profession.

some lawyers crave. Matasar reveals that, “[a]s a lawyer, I barely recognized why practice was so emotionally testing; I’m still not sure I fully understand.”<sup>75</sup> Since he is probably not wondering alone, it is high time we operationalized lawyers’ unease. What are the processes underlying Ashe’s vague sense of spiritual depletion, or Matasar’s ill-comprehended pain? Through the interconnected lenses of human psychology and sociology, the subsequent sections present an account of lawyers’ struggles with the principles of partisanship and non-accountability—an account not about morality in the abstract, but about what happens when lawyers’ emotions conflict with their professional duties. How do lawyers fare when they have not attained the detachment ideal—which I suspect that most lawyers cannot readily do—and must contend daily with conflicts, large or small, between personal and professional self? What happens when a lawyer asks the question that partisanship does not allow: should my client prevail?

Part A provides the necessary background on emotional labor by defining the concept, describing how it works, and explaining its dangers. Meanwhile, Part B applies the theory of emotional labor directly to the legal profession.

### *A. Emotional Labor Theory Generally*

#### 1. Emotional Labor: How It Is Defined

Arlie Russell Hochschild introduced the concept of “emotional labor” in 1983.<sup>76</sup> In studying flight attendants, she found that, in addition to commonly recognized physical and mental exertions, such as pushing heavy meal carts or organizing emergency evacuations, their work entails emotional labor.<sup>77</sup> Emotional labor “requires one to induce or suppress feeling in order to sustain the [organizationally desired] outward countenance that produces the proper state of mind in others—in this case [of flight attendants],

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75. Matasar, *supra* note 71, at 975.

76. See Dieter Zapf, *Emotion Work and Psychological Well-Being: A Review of the Literature and Some Conceptual Considerations*, 12 HUM. RES. MGMT. REV. 237, 238 (2002) (referencing HOCHSCHILD, *supra* note 74). As a sociologist, Hochschild distinguished between “emotional labor” and “emotion work,” defining the former as the exchange value of work sold for a wage and the latter as the use value of such work in the private context. Psychologists tend to use “work,” instead of “labor,” to describe individual behavior and intrapsychic concepts as opposed to management relations. See *id.* at 238–39. Although I rely largely on psychological studies, I use the terms “emotional labor” and “emotion work” interchangeably.

77. See HOCHSCHILD, *supra* note 74, at 6–7.

the sense of being cared for in a convivial and safe place.”<sup>78</sup> The process is generally defined by three factors: 1) the work occurs in interactions with clients (face-to-face, or voice-to-voice); 2) “emotions are displayed to influence other people’s emotions, attitudes, and behaviors; and [3)] the display of emotions has to follow certain rules.”<sup>79</sup> For example, airlines train novice flight attendants to smile for their patrons, so that they appear friendly and cheerful no matter how tired they feel or how aggressively their passengers behave,<sup>80</sup> because this is part of the service: “the value of a personal smile is groomed to reflect the company’s disposition—its confidence that its planes will not crash, its reassurance that departures and arrivals will be on time, its welcome and its invitation to return.”<sup>81</sup> While organizational psychologists have focused on the “physical and cognitive aspects of work since the beginning of [the twentieth] century,” researchers only recently began to study emotional work demands.<sup>82</sup>

## 2. Emotional Labor: How It Is Shaped

Rules or standards of behavior indicating which emotions are appropriate in given situations and how they should be expressed publicly—called “display rules” or “feeling rules”—guide emotion work.<sup>83</sup> Some companies, including Delta Airlines, Disney, and McDonald’s, explicitly provide such rules to their employees.<sup>84</sup> For example, Walt Disney World uses classes, handbooks, and billboards to teach new employees “exactly which positive and esteem-enhancing emotions they must convey to ‘guests’ at Walt Disney World.”<sup>85</sup>

In contrast, professionals are thought typically to supervise their own emotion work in light of informal professional norms and

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78. *Id.* at 7.

79. Zapf, *supra* note 76, at 239.

80. As discussed further below, there is believed to be some emotional labor involved even when an individual’s felt emotion is congruent with the organizationally desired emotion because of the effort involved in ensuring that the felt emotion is expressed in an organizationally appropriate way. See J. Andrew Morris & Daniel C. Feldman, *The Dimensions, Antecedents, and Consequences of Emotional Labor*, 21 ACAD. MGMT. REV. 986, 988 (1996).

81. HOCHSCHILD, *supra* note 74, at 4.

82. Zapf, *supra* note 76, at 238.

83. *Id.* at 241. Hochschild called these “feeling rules” because she considered the management of inner feelings to be crucial to the process of emotional labor, whereas researchers who emphasize outer expression prefer the term “display rules.” *Id.*

84. See *id.*

85. J. Andrew Morris & Daniel C. Feldman, *Managing Emotions in the Workplace*, 9 J. OF MANAGERIAL ISSUES 257, 259 (1997).

client expectations.<sup>86</sup> There is no doubt that most lawyers have greater job autonomy than most McDonald's employees. However, the standard conception of the lawyer's role, as embodied by professional standards governing lawyers, sends more than an informal message to lawyers about how they should be handling their emotions.<sup>87</sup> Part III.B addresses feeling rules for lawyers in greater depth.

### 3. Emotional Labor: How It Is Done

Workers may perform emotional labor under two different scenarios. First, researchers believe that individuals experience a relatively mild form of emotional labor even in situations where there is *congruence* between their felt emotions and the organizationally desired emotions because they "still have to exert some effort to ensure that what is felt will be displayed in organizationally appropriate ways (i.e., that the feeling of happiness is displayed in an appropriate smile or greeting)."<sup>88</sup> Second, when individuals' felt emotions are *incongruent* with display rules, they expend greater effort on emotional labor than their counterparts in the first scenario.<sup>89</sup>

This Article is concerned with lawyers' experience of the second condition because it is more onerous than the first and probably fairly common. Many service workers report a discrepancy between what they actually feel and the emotions they are expected to display.<sup>90</sup> Such a divergence of feeling and rule is widespread because:

[E]motions are often involuntary (e.g., a doctor feels momentary disgust at the sight of a deformed person), they often lag behind situational cues (e.g., an upset company lawyer enters a meeting where she is expected to be emotionally neutral), and they are subject to situational stressors, mood, fatigue, and other factors besides normative demands.<sup>91</sup>

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86. See HOCHSCHILD, *supra* note 74, at 154.

87. See *supra* Part II.A (defining "standard conception" of lawyer's role); *infra* Part III.B.1 (addressing in greater depth lawyers' "feeling rules").

88. Morris & Feldman, *supra* note 80, at 988; see also Blake E. Ashforth & Ronald H. Humphrey, *Emotional Labor in Service Roles: The Influence of Identity*, 18 ACAD. MGMT. REV. 88, 94 (1993).

89. See Morris & Feldman, *supra* note 80, at 988.

90. See Jeroen Jansz & Monique Timmers, *Emotional Dissonance: When the Experience of an Emotion Jeopardizes an Individual's Identity*, 12 THEORY & PSYCHOL. 79, 86 (2002).

91. Ashforth & Humphrey, *supra* note 88, at 97.

Thus, feeling rules cannot regulate actual experience.<sup>92</sup> Although there are differences, such as status, in the occupational experiences of service workers and lawyers, it is reasonable to assume that lawyers also encounter a disconnect between their true emotions and feeling rule requirements under certain circumstances.

So how exactly do employees perform emotional labor when their true feelings are different from what feeling rules dictate? Hochschild argues that service providers comply with feeling rules through surface or deep acting.<sup>93</sup> Surface acting involves the use of cues, such as facial expressions, gestures, and voice tone, to feign emotions that are not actually felt.<sup>94</sup> Subsequent researchers have identified that employees can surface act by “faking in good faith” or “faking in bad faith,” as discussed further in Part III.B.2.<sup>95</sup> Since surface acting maintains the disconnect between true feeling and emotional display, it is associated with high emotional dissonance.<sup>96</sup>

Deep acting is the means by which a person attempts to experience the emotions that she is expected to display. She may actively seek to evoke or suppress a feeling (e.g., a flight attendant mentally coaching herself to stay calm despite a passenger’s irritating behavior), or use her imagination to summon thoughts or memories that she associates with the sought emotion.<sup>97</sup> Given the effort employees must exert to achieve alignment between diverging inner and expressed feelings, deep acting has been associated with emotional effort rather than dissonance.<sup>98</sup>

#### 4. Emotional Labor: Why it Matters

Although emotional labor has such benefits as improving customer service, researchers have recognized that “[w]hat is functional for the organization and customer may well be dysfunctional for the service provider.”<sup>99</sup> While, in one sense, the flight attendant’s requisite smile and all its symbolism simply provides a service, in another, “it estranges [a] worker[] from [her] own smile[] . . . ,” for she no longer expresses what she actually feels in the moment.<sup>100</sup> For instance, one flight attendant in Hochschild’s

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92. *See id.*

93. *See, e.g.,* HOCHSCHILD, *supra* note 74, at 33, 35–55.

94. *See id.* at 92–93.

95. *Id.* at 93.

96. *See* Zapf, *supra* note 76, at 245; *see also infra* Part III.A.4.

97. *See* Ashforth & Humphrey, *supra* note 88, at 93.

98. *See* Zapf, *supra* note 76, at 245; *see also infra* Part IV.A.

99. Ashforth & Humphrey, *supra* note 88, at 96.

100. HOCHSCHILD, *supra* note 74, at 5.

study describes the difficulty of escaping the effects of her “professional smile” after work, and she complains, “I can’t release myself from an artificially created elation that kept me ‘up’ on the trip.”<sup>101</sup> In light of such findings, Hochschild recognized early on that employees who frequently pretend to feel what they do not actually experience may suffer from a sense of falseness or hypocrisy.<sup>102</sup> Or they may modify their authentic emotions so much so that they impair their ability to feel real emotion, depleting a part of themselves that is essential to individuality.<sup>103</sup> Because emotions serve as signals for how we see the world,<sup>104</sup> “when we succeed in lending our feelings to the organizational engineers of worker-customer relations—we may pay a cost in how we hear our feelings and a cost in what, for better or worse, they tell us about ourselves.”<sup>105</sup>

Accordingly, most of the literature on emotional labor addresses its negative consequences, including drug and alcohol abuse, headaches, absenteeism, burnout, poor self-esteem, depression, cynicism, role alienation, and self-alienation.<sup>106</sup> However, a few scholars have found that emotional labor enhances satisfaction, security, self-esteem, self-efficacy, and task effectiveness.<sup>107</sup> For instance, one study describes supermarket clerks who sincerely enjoy displaying organizationally-mandated emotions by using jokes and other forms of entertainment.<sup>108</sup> Such inconsistent results have inspired researchers to isolate the aspects of emotional labor responsible for negative health outcomes. Thus, while early researchers (including Hochschild) provided a limited construct of emotional labor, assuming that it is damaging simply when requisite emotional displays are intense and frequent, recent investigators have identified an additional dimension of emotional labor that may be the true source of harm.<sup>109</sup>

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101. *Id.* at 4.

102. *See, e.g.*, HOCHSCHILD, *supra* note 74, at 187–88; *see also* Ashforth & Humphrey, *supra* note 88, at 96–97.

103. *See, e.g.*, HOCHSCHILD, *supra* note 74, at 187–88; *see also* Ashforth & Humphrey, *supra* note 88, at 97.

104. *See* HOCHSCHILD, *supra* note 74, at 17.

105. *Id.* at 21.

106. *See* Rebecca Abraham, *Emotional Dissonance in Organizations: Antecedents, Consequences, and Moderators*, 124 GENETIC SOC. & GEN. PSYCHOL. MONOGRAPHS 229, 230 (1998) (referencing studies in HOCHSCHILD, *supra* note 74); Susan M. Kruml & Deanna Geddes, *Catching Fire Without Burning Out: Is There an Ideal Way to Perform Emotion Labor?*, in *EMOTIONS IN THE WORKPLACE: RESEARCH, THEORY, AND PRACTICE* 177, 179 (Neal M. Ashkanasy et al. eds., 2000) (listing literature addressing negative outcomes of emotion labor).

107. *See* Abraham, *supra* note 106, at 230 (referencing studies published by Martin Tolich in 1993); Kruml & Geddes, *supra* note 106, at 179 (listing studies).

108. *See* Abraham, *supra* note 106, at 230 (referencing Tolich).

109. *See id.* at 230–31 (referencing studies); Zapf, *supra* note 76, at 241–42.

This critical dimension is emotional dissonance, which occurs "when an employee's expressed emotions are in conformity with organizational norms but do not represent his or her true feelings."<sup>110</sup> Labor is especially intensive under such circumstances, as a person aims to control true feelings while expressing sanctioned emotions during interpersonal transactions.<sup>111</sup> Hochschild recognized that employees are likely to experience emotional dissonance when they surface act,<sup>112</sup> but she failed to identify dissonance as a fundamental component of the emotional labor itself.<sup>113</sup> Though early examinations of emotional dissonance always considered it a *consequence* of emotional labor, it is now believed to be a *component* of the emotional labor construct.<sup>114</sup>

Accordingly, researchers have recently posited that "the frequency and variety of emotional displays may evoke positive reactions, whereas emotional dissonance [in particular] . . . may cause dissatisfaction."<sup>115</sup> For instance, organizational rules requiring flight attendants to smile are unlikely to have adverse consequences, even if applied frequently, when an employee is naturally inclined to smile, but may cause potentially harmful emotional dissonance if an employee must smile when he does not genuinely feel cheerful. As a "form of person-role conflict between personal and organizationally mandated emotions,"<sup>116</sup> emotional dissonance may be a stressor with deleterious effects, including "personal fragmentation of the self,"<sup>117</sup> emotional exhaustion, job dissatisfaction, and "personal and work-related maladjustment, such as poor self-esteem, depression, cynicism, and alienation from work."<sup>118</sup>

### B. Emotional Labor for Lawyers

Flight attendants are among a variety of employees, ranging from cashiers and salespeople to doctors and lawyers, who must perform emotional labor, "the psychological processes necessary to regulate organizationally desired emotions."<sup>119</sup> While most sales

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110. Abraham, *supra* note 106, at 231.

111. See Morris & Feldman, *supra* note 85, at 259.

112. See Kruml & Geddes, *supra* note 106, at 178.

113. See Zapf, *supra* note 76, at 241–42; see also Abraham, *supra* note 106, at 230.

114. Morris & Feldman, *supra* note 85, at 259.

115. Abraham, *supra* note 106, at 230.

116. *Id.* at 231 (citations omitted).

117. *Id.* at 241.

118. Ashforth & Humphrey, *supra* note 88, at 96–97; see also Zapf, *supra* note 76, at 245.

119. See HOCHSCHILD, *supra* note 74, at 244, 246–51 tbls.1–4; Zapf, *supra* note 76, at 238–39.



workers, managers, and administrators perform some emotion work, only certain jobs in the professions, service work, and clerical work seem to involve significant amounts of emotional labor. Lawyers make their mark as occupants of a profession high in emotional labor.<sup>120</sup> Accordingly, lawyers are vulnerable to the costs of emotional labor discussed above and should become the subject of relevant empirical work.

### 1. Feeling Rules for Lawyers: Act Zealous, Feel Detached

Feeling rules for lawyers may vary to some degree across organizations. However, this Article focuses on what professional norms instruct lawyers to do with their emotions, rather than on how specific organizations communicate these norms. As discussed in Part II, the legal establishment expects lawyers to represent their clients with zeal. While “zeal” is not in the set of emotions—happiness, fear, anger, sadness, disgust—commonly regarded as fundamental, and is not easily associated with one outward expression (e.g., a smile), it evokes images of passionate, fervent advocacy that are inextricably linked with various forms of emotional display. Accordingly, while rules drafters might argue that “zeal” says less about requisite emotional displays than it does about the level of commitment a lawyer must devote to her client’s cause, it would be difficult for them to deny that the nature of the lawyer’s task carries with it the expectation that this “zeal” will be conveyed to clients, judges, juries, and other lawyers. A lawyer appearing to distrust her client, or to detest the client’s cause, will not be particularly effective in a negotiation or courtroom appearance. In fact, certain norms have developed for displaying zeal in advocacy.

Jennifer Pierce has provided an empirical account of how litigators, driven by the profession’s goal of zealous advocacy, “make use of their emotions to persuade juries, judges, and witnesses in the courtroom and in depositions, in communications with opposing counsel, and with clients.”<sup>121</sup> Her research demonstrates that lawyers’ emotion work reaches beyond their interactions with clients alone. Upon observing lawyers in training at The National Institute of Trial Advocacy (NITA) and litigators at two large San Francisco law firms, Pierce concluded that they perform emotional labor by

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120. See HOCHSCHILD, *supra* note 74, at 245, 246–47 tbls.1–2.

121. Jennifer Pierce, *Rambo Litigators: Emotional Labor in a Male-Dominated Occupation*, in *MASCULINITIES IN ORGANIZATIONS* 1, 2 (Cliff Cheng ed., 1996).

using intimidation, as well as “strategic friendliness,” in the course of these various interactions.<sup>122</sup>

Trial lawyers are trained “to intimidate, scare, or emotionally bully the witness or opposing counsel into submission.”<sup>123</sup> For instance, NITA instructors teach lawyers “how to *act mean*” and aggressive, even coaching them to evoke actual feelings of anger in themselves, so that they have an intimidating effect during cross-examination.<sup>124</sup>

At the same time, according to one NITA teacher, “[l]awyers have to be able to vary their styles [and] . . . to have multiple speeds, personalities and styles.”<sup>125</sup> Under certain circumstances, lawyers are thought to garner more influence by acting nice, polite, or dumb.<sup>126</sup> During the course of one seminar, the same trial-lawyer-in-training may be scolded for being too nice, or too stern, depending on the exercise.<sup>127</sup>

Displays of zeal surely take other, unstudied forms, as well. For instance, just as flight attendants must smile to make their passengers feel safe, lawyers must act zealous to assure their clients that they are receiving adequate representation. In a recent study, male inmates were asked to describe the qualities of their ideal defense attorney.<sup>128</sup> They ranked “loyalty,” in the form of “totally committed” and aggressive representation, as their most valued attorney characteristic.<sup>129</sup> This Article in no way means to suggest that defendants deserve anything less than effective representation. However, it is important to recognize that there can be significant emotional labor involved in displaying zeal (whether before the client or in court) on behalf of a defendant who, for example, the lawyer knows has committed a particularly heinous crime.

Rather than highlighting the psychological risk to litigators, Pierce exclusively portrays litigators as the problem—growing up to become con men who manipulate emotions to win cases that are not fully defensible on the basis of reason.<sup>130</sup> She omits the possibility that lawyers suffer in the process of integrating professional rules and norms that teach them the same lesson that airlines

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122. *Id.* at 2–3, 7.

123. *Id.* at 9.

124. *Id.* at 10.

125. *Id.* at 16.

126. *Id.*

127. *See id.* at 11, 20–21.

128. *See* Marcus T. Boccaccini & Stanley L. Brodsky, *Characteristics of the Ideal Criminal Defense Attorney from the Client's Perspective: Empirical Findings and Implications for Legal Practice*, 25 LAW & PSYCHOL. REV. 81, 95–97 (2001).

129. *Id.* at 98.

130. *See* Pierce, *supra* note 121, at 4–5.

teach flight attendants: manage your natural emotions in order to provide that requisite service. For lawyers, this service is zealous advocacy. And when their personal feelings are in conflict with the mandatory displays of zeal (because zeal, perhaps in distorting the truth or causing a negative externality, seems immoral), they must work as hard, if not harder—and are susceptible to psychological costs as high, if not higher—as the flight attendant forcing a smile for his aggressive or arrogant passenger.

The lawyer's labor is potentially compounded by the fact that she must go beyond acting friendly to a repugnant client, to acting zealous in transactions with others to further this client's interests. So she deals not only with the fact that she is, metaphorically speaking, "faking a smile," but also with the nagging concern that she may be creating injustices through her advocacy efforts, despite natural inclinations to the contrary. While, admittedly, injustice is an ambiguous concept, it remains psychologically significant that lawyers must routinely surrender their personal notions of justice to a zealous advocacy requirement that embraces only the intangible and uncertain justice of the adversarial system—and that this process can hurt. Furthermore, at times, lawyers' discomfort may reflect the moral shortcomings of the professional rules of conduct. Accordingly, the special societal consequences attending the lawyer's role have implications for addressing the problems of emotional labor.<sup>131</sup>

Rules of feeling for lawyers do not stop at zealous advocacy. Lawyers are also expected to maintain a seemingly contradictory inner existence, in the form of professional detachment. As described in Part II, professional standards recognize detachment as enabling lawyers to hold personal views (that can translate into emotional sentiments), which might otherwise be in tension with their clients' interests, without undercutting their zeal.<sup>132</sup> Presumably, if a lawyer feels naturally zealous about a case, the rules do not begrudge her that. However, if there is a conflict between a lawyer's inner feelings and her outer displays, she is to detach so that the former does not interfere with the latter. The processes underlying emotion work suggest that such detachment may be harder to achieve than it seems, and worse yet, that it may hinder lawyers and, ultimately, undermine their ethical judgment.<sup>133</sup>

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131. See *infra* Part IV.

132. See *supra* Part II.

133. See *infra* Part IV.A.1–2.

## 2. Emotional Labor Costs for Lawyers

Given the evidence that lawyers are in poor mental health and professionally dissatisfied at high rates,<sup>134</sup> it is particularly worthwhile to explore the impact of emotional dissonance—this most troubling aspect of emotional labor—on their well-being. By focusing on the potential conflict between personal feelings and the required zealous displays inherent to legal practice, this Article captures lawyers' susceptibility to emotional dissonance and its psychological costs.<sup>135</sup> No matter how fervently professional rules and norms insist that lawyers separate their personal identities from their professional ones, in situations where lawyers' experienced emotions do not mesh with their prescribed role, emotional dissonance may emerge as a consequence of surface acting.

Emotional dissonance can originate from "faking in good faith" or "faking in bad faith"—two versions of surface acting mentioned in Part III.A.3—which may cause different health outcomes.<sup>136</sup> Employees faking in good faith accept the norms of prescribed behavior even though their true feelings do not always match them, whereas those faking in bad faith fundamentally reject these norms (e.g., "employees who think that 'pasting on a smile' should not be part of their jobs").<sup>137</sup> A lawyer who finds a particular case troubling may fake in good faith because she believes in the importance of providing zealous representation under all circumstances in an adversary system, whereas a lawyer faking in bad faith may believe the zealous advocacy requirement to be distastefully rigid and unqualified.

The mental health impact of faking in good faith likely depends on the circumstances. Hochschild found that flight attendants who fake cheerfulness in good faith, while harboring contempt for particular passengers, are harmed because of the estrangement between their felt and expressed emotions.<sup>138</sup> Meanwhile, researchers have identified settings where faking in good faith protects workers from burnout.<sup>139</sup> For example, health service workers are said to cope with burnout by acting concerned about their

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134. See *supra* Part I, pp. 144–45.

135. Some lawyers may feel that they advance causes that they sincerely embrace, and therefore experience emotional consonance rather than dissonance. This symbiosis between lawyer and purpose is a beautiful thing, but the focus of this Article is that which causes lawyers distress.

136. Abraham, *supra* note 106, at 231; see also *supra* Part III.A.3 (explaining the terms).

137. Abraham, *supra* note 106, at 231; see also Anat Rafaeli & Robert I. Sutton, *Expression of Emotion as Part of the Work Role*, 12 ACAD. MGMT. REV. 23, 32 (1987).

138. Rafaeli & Sutton, *supra* note 137, at 23, 32.

139. See *id.* at 32–33; see also Abraham, *supra* note 106, at 231.

terminally ill patients, while actually allowing themselves to feel emotionally detached.<sup>140</sup> Either these are competing findings, or perhaps they suggest that faking in good faith only reduces stress when it helps an employee cope with emotions that are felt too deeply (e.g., detachment could prevent burnout otherwise induced by devotion to terminally ill patients).<sup>141</sup>

Without additional empirical research, it is difficult to say what these findings mean for lawyers who fake in good faith. It seems obvious, however, that there is a fundamental difference between what a health service worker experiences in watching a patient die, and what a lawyer experiences in advocating toward morally questionable ends. Even if both professionals internalize the behavioral norms of their professions, there is an intuitive disparity between the following two scenarios: 1) acting concerned while actually maintaining some distance from a dying patient, so as to protect oneself from the loss (or even emotionally detaching from a rude patient, so as to keep from taking the verbal attacks too personally); and 2) detaching from one's own conscience—which signals that one may be promoting an injustice—in order to advocate zealously for a client. The mental health of the lawyer, who may find herself affirmatively promoting some bad end as a result of this detachment from her conscience, would seem more likely compromised than that of the health service worker, whose main goal is to protect herself without making a discernable negative impact on the universe.<sup>142</sup> The distinction between the use of detachment in medicine and law, and an abbreviated role for detachment in coping with emotional dissonance, are explored further in Part IV.A.2.

Research indicates that faking in bad faith, which represents a clash between personal values and role requirements, is a clear threat to employee well-being.<sup>143</sup> Employees who comply with display rules in bad faith may experience “strong feelings of duplicity,” while those who resist may receive significant “organizational pressure to conform.”<sup>144</sup> Thus, under current professional norms, lawyers who reject the values of partisanship and non-accountability, perceiving them to be in conflict with some other valued identity, face the greatest psychological risk. Such lawyers

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140. See Rafaeli & Sutton, *supra* note 137, at 32–33; see also Abraham, *supra* note 106, at 231.

141. See Rafaeli & Sutton, *supra* note 137, at 33; see also Abraham, *supra* note 106, at 231.

142. See *infra* Part IV.A.2 (exploring both the distinction between the use of detachment in medicine and law and the role detachment plays in coping with emotional dissonance).

143. See Rafaeli & Sutton, *supra* note 137, at 32; Abraham, *supra* note 106, at 231–32.

144. Abraham, *supra* note 106, at 232.

may not be few and far between, perhaps believing that advocacy should be public interest-oriented rather than strictly client-oriented, or that zealous advocacy should only stretch so far as the bounds of morality.

### 3. Applicability of Research Findings to Lawyers

Most of the existing empirical research on emotional labor focuses on service workers. Although the principal results should apply to lawyers as well, it is important to study lawyers specifically to avoid overgeneralizing prior findings.<sup>145</sup> One reason for caution is the possibility that “prestigious positions offer status shields for workers,” enabling doctors, lawyers, and other professionals to cope more easily with emotional labor than service workers who do not answer to themselves.<sup>146</sup> Such a theory is consistent with research findings, discussed in Part IV.C, that greater autonomy leads to less dissonance. Of course, zealous advocacy is such a fundamental component of the lawyer’s role that autonomy may not fully compensate for its emotional demands.<sup>147</sup>

Researchers have also noted that students in professional schools learn to keep an emotional distance from their clients, such that they are less vulnerable than service workers to clients’ complaints, threats, and other emotional displays.<sup>148</sup> “Professional demeanor” is said to reduce professionals’ emotional labor.<sup>149</sup> However, to the extent that it specifically protects professionals against needy or abusive clients, professional demeanor still would not necessarily alleviate emotional dissonance stemming from the range of situations in which lawyers’ personal feelings conflict with expected displays of zealous advocacy. Whether lawyers can, or should, professionally detach in the way the ALI suggests—to keep their personal views separate from their professional stances—is a separate and more complicated question, as discussed further in Part IV.

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145. See Kruml & Geddes, *supra* note 106, at 181 (limiting variance in their study by controlling for type of job).

146. Barbara Stenross & Sherryl Kleinman, *The Highs and Lows of Emotional Labor: Detectives’ Encounters with Criminals and Victims*, 17 J. CONTEMP. ETHNOGRAPHY 435, 449 (1989).

147. See *infra* Part IV.C.

148. Stenross & Kleinman, *supra* note 146, at 449.

149. *Id.*

#### IV. POTENTIAL ANTIDOTES TO THE COSTS OF LAWYERS' EMOTIONAL LABOR—AND THEIR IMPLICATIONS

The remainder of this Article uses the insights of emotional labor theory to propose possible antidotes to the psychological costs of lawyers' emotional dissonance, all the while recognizing the potentially important role of dissonance as a regulator of lawyer ethics. Assuming that, in the context of existing professional rules, emotional dissonance provides inner caution to lawyers against immoral acts, we may want to identify a solution that both reduces psychological harm to lawyers and maintains this critical signaling function. Part A suggests that performing deep acting might better enable lawyers to circumvent emotional dissonance than detachment and surface acting; Part B encourages individuals to self-select into the legal profession, as well as particular work environments, by first considering their personal susceptibility to emotional dissonance; and Part C makes the most radical proposal of all—to modify the zealous advocacy prong of the lawyer's role, so that lawyers may avoid emotional dissonance through greater moral autonomy. Arguably, this third suggestion is the only one of the three that reduces emotional dissonance without compromising lawyer ethics.

##### *A. Deep Acting*

Although lawyers will always have to contend with a certain amount of emotional labor given the nature of their jobs, it may be possible to reduce such labor and its costs. One way for lawyers to avoid the psychological strain of emotion work may be to perform deep acting, rather than to detach and, by inference, perform surface acting like professional standards currently prescribe. This may seem obvious, since surface acting leads to emotional dissonance and dissonance, in turn, causes psychological harm. However, deep acting requires emotional effort that theoretically could be damaging as well. In fact, Hochschild argues that, whether the method of expressing emotion according to feeling rules is surface or deep acting, a sense of estrangement might result because deep acting requires "conscious mental work . . . [,] keep[ing] the feeling that I conjure up from being part of 'myself.'"<sup>150</sup>

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150. HOCHSCHILD, *supra* note 74, at 36.

Notwithstanding Hochschild's observation, a recent study of service employees, measuring whether the method of emotional labor—either surface acting, associated with high emotional dissonance, or deep acting, associated with high effort—results in different psychological outcomes, reinforces the notion that surface acting does have uniquely detrimental effects.<sup>151</sup> More specifically, the findings indicate the following: 1) surface acting, or greater dissonance, is correlated with greater emotional exhaustion, dissatisfaction with job accomplishments, negative or cynical attitudes toward customers, and less job involvement; while 2) deep acting, or greater emotive effort, is correlated with less emotional exhaustion, greater satisfaction with job accomplishments, less negativity toward customers, and greater job involvement.<sup>152</sup>

The interplay between emotional labor and social identity theory may help to explain why deep acting reduces psychological strain. Social identity theorists believe that "individuals who strongly identify with their organizational roles . . . —that is, individuals who regard their roles as a central, salient, and valued component of who they are—are apt to feel most authentic when they are *conforming* to role expectations, including display rules."<sup>153</sup> The *perception* that one is acting contrary to a valued identity in conforming to display rules prompts emotional dissonance and self-alienation—not the acting *per se*, for sometimes acting allows a person to adopt a treasured identity.<sup>154</sup> When emotions are involved, individuals have a harder time distancing themselves from the positions they assume because emotions "provide strong cues for the construction of identity . . . ."<sup>155</sup> Since deep acting involves changing one's felt emotion, it is likely to lead more quickly to identification with the role than surface acting.<sup>156</sup> Accordingly, over time, deep acting may foster a sense of authenticity.

The above-mentioned findings suggest that, through deep acting, lawyers may reduce the psychological strain of their role as zealous advocate. Meanwhile, professional rules counsel the opposite, urging lawyers to invoke detachment strategies when they do not naturally feel zealous about a case or client.<sup>157</sup> In essence, the legal profession is instructing lawyers to fake zeal if necessary, when instead it could be encouraging them to align their true emotions

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151. See Kruml & Geddes, *supra* note 106, at 178–79.

152. See *id.* at 182–83.

153. Ashforth & Humphrey, *supra* note 88, at 98.

154. See *id.* at 99.

155. *Id.* at 101.

156. See *id.* at 101, 104.

157. See *supra* Part II.A., pp. 146–52.



with requisite zealous displays, in pursuit of better mental health outcomes. NITA instructors may be on to something when they coach their trainees to evoke actual feelings within themselves, so as to produce the intended effects on witnesses and opposing counsel.

Additional research is obviously required before we can conclude with confidence that the legal profession should wholeheartedly embrace deep acting. However, as a start, open discussion about the utility of deep acting may encourage lawyers to share their emotional labor concerns. Research indicates that emotional support from coworkers may reverse the harmful effects of emotional dissonance.<sup>158</sup> To facilitate access to such support, the legal profession must move beyond the assumption that all lawyers can carry out their roles, according to the standard conception, without psychological angst. As long as emotional dissonance is considered everyone else's problem, lawyers will feel uncomfortable seeking help.

Further, a balanced dialogue about deep acting must acknowledge several important caveats to its potential utility.

### 1. Caveat # 1: Deep Acting as a Cause of Emotional Dissonance

First, one worries about the theoretical possibility that deep acting produces its own form of emotional dissonance, different from the unease emerging when someone must feign an emotion that she does not feel according to display rules. In studying Dutch teachers, researchers have identified a form of emotional dissonance where "the uneasy feeling emerges immediately as a result of an emotional experience . . . [that] is evaluated as threatening the individual's identity."<sup>159</sup> For instance, a teacher instinctively may feel angry when a student who normally lags behind continues to perform poorly.<sup>160</sup> In response to this anger, he may experience a second feeling in the form of dissonance—"the result of a swift, and tacit, evaluation of the anger experience"—because he identifies as being a supportive teacher, and supportive teachers are not supposed to become angry under such circumstances.<sup>161</sup>

Thus, it seems plausible that a lawyer who sees herself as objective and sincere may experience dissonance similar to that of the angry teacher if she deep acts her way into a sensation of zealous-

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158. See Abraham, *supra* note 106, at 235–36, 242–43.

159. Jansz & Timmers, *supra* note 90, at 87.

160. See *id.* at 79.

161. *Id.* at 80.

ness in a case that would normally seem repugnant, or even just borderline, to her. While the other research findings suggest that the psychological strain of surface acting, nonetheless, outweighs that of deep acting, we might question the ease with which a shift in identity occurs in light of this additional dissonance theory, and in light of Hochschild's belief that deep acting produces self-alienation.

Even so, the Dutch study does not suggest that a norm of detachment is the answer either. Emotional dissonance like that experienced by the Dutch teachers introduces the possibility that a lawyer who generally embraces the standard conception of the lawyer's role, but nonetheless experiences emotional dissonance in situations that conflict with her moral compass, may suffer an identity crisis to boot *because of* the professional detachment mandate. That is, she may start to question her identity of devoted advocate if she finds herself incapable of achieving the detachment prescribed by her profession. The legal profession's detachment prescription may be inherently problematic for conflicted lawyers who generally internalize the profession's norms.

## 2. Caveat # 2: Defense Mechanisms—Detachment, After All?

A second caveat is the importance of recognizing that certain forms of detachment—significantly more limited in scope than professional standards prescribe—theoretically may complement deep acting as effective coping mechanisms for lawyers. Instead of ultimately identifying with their professional role to alleviate the emotional discrepancies that cause dissonance and self-alienation, individuals may employ a range of behavioral and cognitive defense mechanisms.<sup>162</sup> On the behavioral front, social workers have been shown to avoid dissonance by routinizing their relationships with clients in a manner that spares them the need to express unfelt empathy and concern.<sup>163</sup> Meanwhile, employing cognitive distancing tactics, "psychiatric emergency teams [have] preserved a desired identity as benevolent caregivers by using derogatory labels to characterize situations where they were forced to physically restrain or coerce patients . . . ."<sup>164</sup>

Arguably, such selected detachment strategies may offer a partial answer to lawyers struggling with emotional discrepancies, *as long*

162. See Ashforth & Humphrey, *supra* note 88, at 104–05.

163. See *id.* at 104.

164. *Id.* at 104–05.

as they are not invoked to the extreme that Postema cautions against.<sup>165</sup> For instance, researchers have suggested that Nazi doctors cognitively insulated themselves from the emotional discrepancies attending the extermination of human beings, particularly in light of their Hippocratic Oath of caregiving, by invoking “psychological numbing” techniques.<sup>166</sup> Such defense mechanisms create a “boundary between one’s central identity and the undesired identity implied by one’s role behavior”<sup>167</sup> to protect the valued self and to forestall the dangers of emotional labor and the pressure for identity realignment. It goes without saying that we do not want lawyers wreaking havoc on society through the kind of psychological numbing tactics employed by Nazi doctors. However, behavioral defense mechanisms like those used by social workers may be appropriate under certain circumstances, such as when a lawyer is attempting to cope with a client who seeks an inordinate amount of attention. Moreover, perhaps some cognitive distancing is justified when a lawyer must, like the psychiatric emergency teams, perform a difficult act toward a necessary end. Along these lines, in some cases, for instance, when a client receives the death penalty, a lawyer may benefit from faking in good faith to protect herself from the loss,<sup>168</sup> as did the health service workers mentioned in Part III.B.2.

A distinction between the task of lawyer and doctor may clarify where the utility of detachment ends in legal practice. When a doctor distances herself to cope with the loss of her terminally ill patient, she may be employing what has been termed “detached concern,” characterized by “internal emotional neutrality and, at the same time, external display of moderate emotions.”<sup>169</sup> Such a process is the product of “occupational feeling rules . . . that comprise both the inner feelings and the expression of emotions whereby the inner feelings have to deviate from the expressed emotions.”<sup>170</sup> The larger notion underlying detached concern is that doctors ought to be sufficiently detached to exercise objective medical judgment and simultaneously able to provide patients with the sensitivity they require.<sup>171</sup>

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165. See *supra* Part II.B.

166. Ashforth & Humphrey, *supra* note 88, at 105.

167. *Id.*

168. Cf. *supra* Part III.B.2 (health service workers).

169. Zapf, *supra* note 76, at 246.

170. *Id.*

171. Nancy R. Angoff, *Making a Place for Emotions in Medicine*, 2 YALE J. HEALTH POL'Y L. & ETHICS 447, 447 (2002) (book review).

Certainly the value of detachment in medical care is a disputable and complex proposition, but this aside, detached concern provides an interesting source of comparison with display rules for lawyers.<sup>172</sup> Like doctors, lawyers are told to express one thing (zealous advocacy), and to feel another (professional detachment). However, while doctors are to remain detached in the name of *objectivity*, lawyers are to do so in the name of *partisanship*. The former aspiration engages doctors in identifying and furthering the best outcome for their patients, while the latter relegates the best outcome to the adversarial system, as if to say that lawyers are merely agents of that system. Accordingly, lawyers are instructed to use detachment, not to weigh all information in order to arrive at a balanced judgment, but to block out emotional cues pointing against their clients' interests, even if these interests seem unjust. In reality, it may be quite difficult for a lawyer with a healthy conscience to consider herself a mere agent when her feelings signal that she is about to further an unjust outcome. More fundamentally, when a lawyer feels that she is about to act immorally, it may be difficult for her to maintain an allegiance to professional norms of largely unqualified zealous advocacy and non-accountability.

Thus, it is unclear how much detachment the average lawyer could actually muster in the face of such emotional dissonance and how much detachment society should stand for when a lawyer questions the morality of her actions. Do we want to eliminate healthy self-doubt as a check on professional conduct? And since defense mechanisms are facilitated by the "support of management or the legitimation of an occupational subculture," do we want the legal profession to endorse professional detachment or non-accountability across the board, without qualification?<sup>173</sup> I would argue not.

### 3. Caveat # 3: Diminishing Lawyer Ethics

Along the same lines, the third, and perhaps most important, caveat is that endorsing lawyers' use of deep acting essentially means urging them to morph their identities in the name of self-protection, and at the expense of the potentially important signaling function of emotional dissonance. One can see why the legal profession would encourage detachment as a coping mechanism for inner conflict when explicitly asking people to realign their

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172. See *id.* at 448.

173. Ashforth & Humphrey, *supra* note 88, at 105.

identities to match their professional roles is a tough sell. Also, there is a concern that greater identification with the role of zealous advocate, while reducing psychological strain, might (like detachment) simultaneously make lawyers more comfortable acting immorally. Assuming that professional rules do not place sufficient ethical limits on lawyer conduct, perhaps the psychological strain of emotional dissonance serves to stop some lawyers from acting immorally and thereby functions as a necessary check on professional conduct. In this sense, the emotional labor of a lawyer ought not be compared loosely to that of a cashier, who generally does not stand to do the same kind of societal damage through identification with her role.

Alternatively, perhaps greater identification with the role would make it more difficult for the average decent lawyer to embrace excessively zealous behaviors that border on the immoral because she would be less able to disassociate such actions from her very being. Under this theory, greater identification may be associated with greater moral obligation of the Luban variety. Additional empirical research on deep acting for lawyers might help to determine which effect is more likely.

Further research is imperative because, assuming that lawyers on the whole follow their profession's feeling rules, the status quo may eventually lead them to identify with overzealous acts that once made them uneasy for good reason. Despite the proven psychological costs of surface acting, researchers have suggested that the resulting emotional dissonance may have a self-regulating function. Over time, like deep acting, even surface acting may provide the internal pressure necessary to realign identity, and thereby integrate feeling and expression.<sup>174</sup> For instance, research has "described both the inauthenticity felt by student nurses when they initially enacted their instructors' conception of the nursing role and the way in which the associated feelings of guilt and hypocrisy helped motivate the students to gradually internalize the role."<sup>175</sup> Furthermore, the very act of publicly expressing emotion may induce a change in felt emotion and may make the person feel committed to her public persona, particularly if she comes to be treated as an exemplar of that role.<sup>176</sup>

The notion that what might be a useful signaling function, if left unbridled, may ultimately pressure lawyers into internalizing morally questionable roles that they did not originally embrace is

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174. *See id.* at 101-02.

175. *Id.* at 102.

176. *See id.*

troubling for professional ethics. In fact, it has been argued that professional values have declined because lawyers have resolved their "moral ambiguity" by shifting their own values.<sup>177</sup> Thus, our failure to thoroughly explore the emotional labor of lawyering may place professional ethics in significant danger.

### B. Self-Selection

A lawyer's ability to withstand emotional dissonance healthfully may depend on her personality.<sup>178</sup> Thus, to mitigate the costs of emotional labor, we may want to teach college students to consider their personalities before electing to pursue the law, and encourage law students as well as practicing lawyers to select work environments most suitable to their particular psychological needs.

Research suggests that individuals who are extroverted and flexible suffer less tension and become more sociable in high-conflict situations.<sup>179</sup> Accordingly, they may more readily rely on social support, which is an effective coping strategy for emotional dissonance.<sup>180</sup> In addition, researchers have identified a need for empirical work on the role of thinking styles in moderating the relationship between emotional dissonance and psychological strain.<sup>181</sup>

Moreover, researchers have hypothesized that "individuals may be better suited for their positions when there is convergence between the expected emotional expression on their jobs and their own predisposition to experience the same type of emotions."<sup>182</sup> For example, people who experience positive emotions more often than negative ones will suffer less frequent dissonance in a job that requires the display of positive emotion.<sup>183</sup> Since, as Pierce argues, lawyers must engage in both hostility and strategic friendliness to perform zealous advocacy,<sup>184</sup> it is difficult to say how this rule of affectivity applies to lawyers' comfort in their roles. Additional empirical research on affectivity and the lawyer role may help counsel individuals on whether to enter the field of law in the first place.

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177. Daicoff, *supra* note 18, at 561–62.

178. See Abraham, *supra* note 106, at 243.

179. *Id.*

180. See *id.*

181. See *id.*

182. Morris & Feldman, *supra* note 80, at 1000.

183. See *id.*

184. See *supra* Part III.B.1.

A lawyer predisposed to the standard conception of her professional role may also cope better with emotional dissonance. The discussion, in Part IV.A., about the role of identity in emotional dissonance<sup>185</sup> suggests that people who naturally internalize the norms of the legal profession and value them as a central part of identity will have better psychological outcomes under a wider array of ambiguous professional circumstances. That is, a person who identifies with advocating zealously over, say, reserving judgment in the name of measured objectivity, will likely feel more comfortable in her lawyer role than a person who identifies primarily with objective reasoning. Therefore, if our goal is a healthier profession, and if the psychological costs of lawyering prove to depend largely on the personalities of individual lawyers, we might focus on teaching college students self-awareness during the career selection process.

Of course, reliance on conscious self-selection into the legal profession as an antidote to emotional dissonance poses ethical risks similar to those discussed in the context of deep acting and detachment. As a result of guided self-selection, conceivably those individuals who would have been most troubled by the profession's immoral over-zealousness—and who otherwise might have provided a check on professional conduct—will opt out of the legal profession. In addition, constructing a profession comprised of a particular type of thinker could stifle creative solutions to complex problems. Does the profession need sacrificial lambs to serve as monitors of ethics and problem-solving practices? Perhaps, though it is unclear that lawyers experiencing emotional dissonance feel they have the discretion to effectively halt immoral professional conduct under current standards.

We might therefore prefer to focus on the self-selection into appropriate work environments of those relatively diverse individuals already in the legal profession. Given that “[t]he vast majority of law students—at least the vast majority of those attending the more prestigious schools (or getting good grades at the less prestigious schools)—want to work in big firms,” it seems unlikely that they are giving due attention to their personal needs in the emotional labor department.<sup>186</sup> Even though large law firm environments may vary to some degree, this herd mentality suggests that law students are not individualizing their choices enough to attend adequately to emotional labor concerns. Counteracting such a tendency is no easy task, particularly if the principle of detachment permeates le-

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185. See discussion *supra* Part IV.A.

186. Schiltz, *supra* note 16, at 896–97.

gal education to the point that graduating students lose touch with what they feel and therefore no longer know how to follow their hearts. Legal educators, however, owe their students the opportunity to grapple with these issues early on in their law school careers.

In particular, we might address emotional dissonance by urging law students and practicing lawyers to seek work environments that enable them to exercise their consciences through job autonomy. A study of customer service representatives in the telecommunications, entertainment, food service, and clothing retail industries indicates that job autonomy reduces emotional dissonance.<sup>187</sup> Employees with greater “freedom, independence, and discretion in performing job tasks” likely enjoy greater discretion in modifying display rules to better match their experienced emotions and thereby experience less emotional dissonance.<sup>188</sup> Assuming, of course, that lawyers suffering from emotional dissonance feel a drive toward greater morality than professional standards facilitate, autonomy would enable them to make more ethical choices in exercising their professional roles.

At first glance, increased job autonomy may not seem like a viable response to emotional dissonance because, while lawyers tend to have more control over their jobs than service workers, professional norms are rather strong and transcend both the office environment and lawyer-client interactions. For instance, all litigators, no matter their sense of autonomy in the office, must argue with zeal in court where they are monitored by judge, jury, client, and opposing counsel. And transactional lawyers, even those who generally feel autonomous in their interactions with clients, know the distress of pushing for unreasonable client demands at the negotiating table.

Nonetheless, the ability of a lawyer to select cases and strategies could make her representations in court and elsewhere feel relatively authentic. Accordingly, a lawyer might choose to work for an organization that modifies display norms by enabling employees to decline cases that cause substantial emotional dissonance or to handle cases in a justice-oriented fashion. If more lawyers begin to demand such job autonomy, the legal market might shift in response and thereby indirectly change the shape of the zealous advocacy requirement. Of course, while autonomy may resolve a lawyer’s most fundamental inner conflicts, it will not attend to the inevitable attorney-client issues that can raise emotional labor con-

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187. See Abraham, *supra* note 106, at 232–33, 242.

188. *Id.* at 232.



cerns. Eliminating emotional labor entirely is neither the goal nor a viable option.

More fundamentally, a lawyer may exercise her autonomy and enhance her emotional consonance by opting in the first instance to work for an organization with a fitting ideological perspective. In so doing, she is likely to minimize the need to decline cases in the course of her employment in order to protect her psychological well-being.

### *C. Moral Autonomy and the Lawyer's Professional Role*

Since deep acting, detachment, and some forms of self-selection into the legal profession theoretically result in identification with morally problematic (extremely zealous) stances, self-selection into positions of greater autonomy may be a preferable solution to lawyers' emotional dissonance. Unfortunately, the autonomy described above is likely to develop only in pockets of the legal profession and thereby to help only a small percentage of lawyers who must continue nonetheless to contend with looming standards of professional conduct. If empirical research shows that lawyers experience high levels of emotional dissonance when forced to serve as unqualified zealous advocates, we may want to reexamine the standard conception of the lawyer's role in order to achieve both a widespread decrease in emotional labor and to better align professional conduct with morality. A fundamental shift in the standard conception of the lawyer's role toward greater moral autonomy may be more broadly and uniformly effective, even if less viable.

Many of us accept the requirements of the legal profession at face value, but alternative models of lawyering are conceivable and might address some of the psychological risks of zealous advocacy. As discussed in Part II, Simon (much like Luban) describes the Dominant View of lawyering ethics as requiring lawyers to pursue any client goal through any arguably legal means, regardless of the impact on the public or other third parties.<sup>189</sup> However, Simon presents alternative approaches to lawyering as well. For instance, the "Public Interest View" urges that the law be applied in accordance with its substantive purposes, mandating disclosure of certain relevant information that the Dominant View counsels lawyers to conceal, rejecting the "manipulation of form in ways that defeat relevant legal purposes," and eliminating the use of procedure in ways that

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189. See *supra* Part II.A.

frustrate substantive norms.<sup>190</sup> Nonetheless, Simon does not see the Public Interest View as a panacea for lawyers' moral anxiety because, like the Dominant View, it adopts "categorical" decisionmaking which restricts the range of considerations that the lawyer may take into account in the face of a particular problem.<sup>191</sup> Thus, categorical decisionmaking denies the decisionmaker the discretion to consider unspecified factors, or specified factors in unspecified ways.<sup>192</sup>

Simon instead promotes a "Contextual View" of ethical decisionmaking, whereby "the lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice."<sup>193</sup> He recognizes that some believe the application of abstract norms such as "justice" to be arbitrary, but responds that, in contexts like judicial and prosecutorial decisionmaking, "lawyers typically insist strenuously on the plausibility of rational, grounded, discretionary judgment."<sup>194</sup> "Decisions about justice [under the Contextual View] are not assertions of personal preferences, nor are they applications of ordinary morality."<sup>195</sup> Rather, a lawyer operating under this paradigm is to think about such decisions as if she were a judge, without focusing exclusively on substance or working only to advance the claims and goals that she believes ought to prevail when actual judges, juries, and executive officials are able to make more reliable determinations about the merits than she is as an individual lawyer.<sup>196</sup> However, "the less reliable the relevant procedures and institutions, the more direct responsibility she needs to assume for substantive justice."<sup>197</sup> Thus, under the Contextual View, the lawyer is to adopt a set of practices that, in the vein of the Public Interest View, "facilitate the presentation of relevant information and forego deception and manipulation."<sup>198</sup> These practices should be adjustable in cases where they do not further just resolutions.<sup>199</sup>

First and foremost, under the Contextual View, the lawyer should try to mitigate procedural defects, only forming her own judgment about the proper substantive resolution when she cannot correct for these defects.<sup>200</sup> A defense lawyer negotiating a settlement with a

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190. SIMON, *supra* note 1, at 8–9.

191. *Id.* at 9.

192. *Id.*

193. *Id.*

194. *Id.* at 10.

195. *Id.* at 138.

196. *See id.* at 139–40.

197. *Id.* at 140.

198. *Id.*

199. *See id.*

200. *See id.*

plaintiff's lawyer who does not know that a recent statute would substantially help her client's case would have a responsibility to move the case toward a just result by disclosing the necessary information because, during settlement, the defense counsel cannot rely on a judge or jury to remedy the procedural breakdown.<sup>201</sup> In contrast, under the Dominant View's categorical rule of nondisclosure, in such a case, those lawyers who entered the profession to further justice are left to suffer extreme emotional dissonance.<sup>202</sup>

Arguably, at the same time that the Contextual View helps the justice-oriented lawyer, it forces a lawyer who instead identifies with competitive win-loss strategies to act against her natural feelings. This may not be a bad outcome, however, if we seek to align psychological comfort with just outcomes and psychological discomfort with unjust outcomes. If psychological strain is to drive anyone out of the profession, perhaps it should be the lawyer who wants to win at all costs.

Concededly, under the existing system, the defendant in the above hypothetical would likely feel betrayed by a lawyer who appears to assist the opposing side. Such an outcome might require defense counsel to engage in emotional labor as she works to address her client's feelings. We should consider whether this would be the price we are willing to pay for greater justice, at least until client expectations shift with the incorporation of the Contextual View into legal norms (assuming this were possible).

Second, sometimes a lawyer also has an ethical choice to make about what Simon calls the "Purpose-versus-Form tension."<sup>203</sup> For example, such a tension arises when the lawyer impeaches a witness she knows to be truthful, or objects to hearsay she knows to be accurate. While the Dominant View does not make the lawyer responsible for applying rules in a way that advances their purposes, the Contextual View requires the lawyer to determine whether purpose or form is more likely to achieve the relevant legal merits.<sup>204</sup> The clearer and more fundamental the relevant purposes, the more the lawyer is bound by them, while the less clear and more problematic, the more justified the lawyer is in treating the relevant rules formally—that is, "understanding them to permit any client goal not plainly precluded by their language," as the Dominant View prescribes.<sup>205</sup> Accordingly, lawyers should do with rules

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201. *See id.* at 141.

202. *See id.*

203. *Id.* at 144.

204. *See id.* at 144–45.

205. *Id.* at 146.

what courts do with contracts and statutes: interpret them to avoid unjust or unintended consequences.<sup>206</sup>

Inevitably, there will be times when a lawyer experiences emotional dissonance over furthering the clear purpose of a rule. However, structuring the lawyer's role to advance legal merits would seem, for the most part, to relieve lawyers of the feeling that they must play the system on behalf of their clients at nearly all costs. In theory, this should alleviate a troubling source of dissonance, while promoting ethical lawyering and potentially improving the public image of lawyers.

Simon acknowledges that both the Dominant View and the Contextual View are aspirational in their conceptions of lawyers as people who "care about the rightness of their conduct and [] are motivated at least to a limited extent to behave ethically."<sup>207</sup> My account of emotional dissonance is driven by a similar view of lawyers as individuals who want to do good, and who are susceptible to psychological harm when they must repeatedly subordinate morality to zealous advocacy. Contextual decisionmaking may provide a way for lawyers to exercise their autonomy through their professional role and thereby alleviate the emotional dissonance that stems from person-role conflict.

Consistent with Simon's Contextual View, Luban concludes that lawyers can be zealous but must also be accountable. If professional and moral obligations conflict, the latter must prevail.<sup>208</sup> If they do not conflict, then professional obligations prevail.<sup>209</sup> Thus, lawyers should be zealous rather than indifferent to their clients' interests, but there should be limits on the tactics invoked to further those interests.<sup>210</sup> Luban may not realize that, in advocating for moral accountability, he promotes not only professional ethics but also a more realistic and psychologically healthier approach to lawyering.

By transforming zealous advocacy into a contoured process through which a lawyer must seek to further just ends, the legal profession would grant justice-oriented lawyers the flexibility to handle professional circumstances in conformance with their personal identities. Such a model of lawyering would seem to promote emotional consonance when it serves society best—through justice, or at least as close as we can come to it. Hence, it would seem more likely than our current system to draw justice-oriented lawyers into the profession, and to keep them here, healthy and wealthy.

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206. *See id.*

207. *Id.* at 11.

208. *See* Luban, *supra* note 29, at 118.

209. *Id.*

210. *Id.*

## V. CONCLUSION

In order to shape a legal profession characterized by integrity, pride, and job satisfaction, we must address the psychological impact of professional norms on lawyers. Implicit to this discussion is an understanding of the lawyer as more than a mere instrument of her client or the adversary system. However, in no way does this Article intend to undermine the importance of the lawyer's ability to serve her client; it simply perceives this service in a more textured way, as inextricably linked with the lawyer's mental health and the moral quality of legal practice generally.

If we determine that zealous advocacy (as currently conceived) is worth preserving, then it may be best, on the basis of empirical findings, to help lawyers achieve this frame of mind as painlessly as possible—through deep acting or appropriate self-selection into the profession. We may conclude, however, that psychological unease ultimately signals over-zealous behavior and that we want to preserve this check on professional conduct. In such a case, we should avoid solutions that minimize dissonance, like deep acting or self-selection, which may lead to lawyers' over-identification with zealous advocacy. The boldest move yet—a fundamental shift in the zealous advocacy requirement—may then be in order, if we are to safeguard both lawyer mental health and morality in legal practice.

At the very least, the legal profession needs to engage in an honest discussion about the emotional sacrifices, not part of the job description, that lawyers routinely make as zealous advocates. For, in our silence, we further the very estrangement we should be seeking to resolve:

[W]hether the separation between “me” and my face or between “me” and my feeling counts as estrangement depends on something else—the outer context. In the world of the theater, it is an honorable art to make maximum use of the resources of memory and feeling in stage performance. In private life, the same resources can be used to advantage, though to a lesser extent. But when we enter the world of profit-and-loss statements, when the psychological costs of emotional labor are not acknowledged by the company, it is then that we look at these otherwise helpful separations of “me” from my face and my feeling as potentially estranging.<sup>211</sup>

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211. HOCHSCHILD, *supra* note 74, at 37.